No. 83-1086

IN THE

Supreme Court of the United States

October Term, 1983

IN THE MATTER

OF

TOP TILE BUILDING SUPPLY CORPORATION, TOP CARPET CORPORATION, NORMAN L. STONE and RICHARD STONE,
Appellants,

against

NEW YORK STATE TAX COMMISSION; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; JAMES H. TULLY, JR., MILTON KOERNER, THOMAS H. LYNCH, Individually and as Members of the State Tax Commission,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION TO DISMISS OR AFFIRM

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Dated: January 10, 1984

Questions Presented.

1. Whether this appeal should be dismissed because the notice of appeal was not timely filed and the case was not docketed in this Court within the time for docketing.

2. Whether the appeal should be dismissed because the appellants did not raise a substantial Federal question in the court below.

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OF

TOP TILE BUILDING SUPPLY CORPORATION, TOP CARPET CORPORATION, NORMAN L. STONE and RICHARD STONE,

Appellants,

against

NEW YORK STATE TAX COMMISSION; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; JAMES H. TULLY, Jr., MILTON KOERNER, THOMAS H. LYNCH, Individually and as Members of the State Tax Commission,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION TO DISMISS OR AFFIRM.

The appellees move the Court to dismiss the appeal herein on the ground that the notice of appeal was not timely filed and on the further ground that it is manifest that no substantial Federal question was raised in the court below.

Statement of the Case.

This appeal raises the question of the alleged deprivation of appellants' property without due process of law. A final administrative determination was issued and sent by certified mail to the appellants on October 23, 1981, by the New York State Tax Commission. The Commission held that appellants were liable for New York sales and use taxes, penalties and interest (Appendix). A proceeding was commenced on February 26, 1982 for judicial review of the determination in the New York Supreme Court, Albany County. The appellees moved for dismissal of proceeding on the grounds that the proceeding was not commenced within the four-month period of limitation set forth in New York Civil Practice Law and Rules, § 217 and Tax Law, § 1138 and that the appellants failed to comply with Tax Law, § 1138(a)(4) which required the appellants to file a bond or deposit with the Tax Commission a sum sufficient to cover the amount of tax, penalties and interest plus costs which may accrue against them in the proceeding prior to the commencement of the proceeding.

The Supreme Court dismissed the proceeding because of the failure of the appellants to file the required bond or deposit without reaching the time limitation question (Appendix, decision unreported). The appellants appealed the judgment entered on the decision of the Supreme Court to the Appellate Division, Third Department of the New York Supreme Court. That court modified the judgment

of the court below and as modified affirmed the judgment on the basis that the condition precedent for the commencement of the proceeding for the filing of an undertaking or deposit contained in Tax Law, § 1138, which the appellants failed to do, are constitutional. The court held that the validity of the assessment, the hearing, the Tax Commission determination of the timeliness of the proceeding for judicial review need not be reached (Appendix, reported 94 AD2d 885; 463 NYS2d 558).

The appellants appealed the order of the Appellate Division entered on that court's decision to the New York Court of Appeals. The appellees moved in that Court for dismissal of the appeal. The Court of Appeals by a decision, reported at 60 NY2d 653, and set forth in the addendum to this brief, and order both dated September 15, 1983 (Appendix) dismisssed the appeal upon the ground that the appellants were not aggrieved by the modification of the Appellate Division and that no substantial constitutional question was directly involved.

A judgment of the Supreme Court pursuant to the order of the Court of Appeals was entered in the Albany County Clerk's Office on September 29, 1983 (Appendix). An appeal to this Court was taken by filing a notice of appeal in the Albany County Clerk's Office on December 23, 1983 (Appendix).

United States Statutes Involved.

28 United States Code (Judiciary and Judicial Procedure), § 1257.

"Sec. 1257. State courts; appeal; certiorari

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

28 United States Code (Judiciary and Judicial Procedure), § 2101(a)(b)(c).

"Sec. 2101. Supreme Court; time for appeal or certiorari; docketing; stay

"(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in

part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

"(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceedings, shall be taken within thirty days from the judgment, order or decree, appealed from, if interloctory, and within sixty days if final.

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

Rule of the United States Supreme Court Involved.

"Rule 12. Docketing Cases

".1. Not more than 90 days after the entry of the judgment appealed from, it shall be the duty of the appellant to docket the case in the manner set forth in paragraph .3 of this Rule, except that in the case of appeals pursuant to 28 U. S. C. §§ 1252 or 1253, the time limit for docketing shall be 60 days from the filing of the notice of appeal. See 28 U. S. C.

§ 2101(a). The Clerk will refuse to receive any jurisdictional statement in a case in which the notice of appeal has obviously not been timely filed.

".2. For good cause shown, a Justice of this Court may extend the time for docketing a case for a period not exceeding 60 days. An application for extension of time within which to docket a case must set out the grounds on which the jurisdiction of this Court is invoked, must identify the judgment sought to be reviewed, must have appended a copy of the opinion, must specify the date and place of filing of the notice of appeal and append a copy thereof, and must set forth with specificity the reasons why the granting of an extension of time is thought justified. For the time and manner of presenting such an application, see Rules 29, 42.2. and 43. Such applications are not favored."

New York Statutes Involved.

New York Tax Law, § 1138 provides in pertinent part:

"§ 1138. Determination of tax

"(a)(1) If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors.

Notice of such determination shall be given to the person liable for the collection or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the tax commission for a hearing, or unless the tax commission of its own motion shall redetermine the same.

"(2) Whenever such tax is estimated as provided for in this section, such notice shall contain a statement in bold face type conspicuously placed on such notice advising the taxpayer: that the amount of the tax was estimated; that the tax may be challenged through a hearing process; and that the petition for such challenge must be filed with the tax commission within ninety days.

* * *

"(4) After the hearing provided for in paragraph one or three of this subdivision, the tax commission shall give notice promptly by registered or certified mail of its determination to the applicant. The determination of the tax commission shall be reviewable for error, illegality or unconstitutionality or any other reason whatsoever by a proceeding under article seventy-eight of the civil practice law and rules if application therefor is made to the supreme court within four months after the giving of the notice of such determination. A proceeding under article seventy-eight of the civil practice law and rules shall not be instituted unless the amount of any tax sought to be reviewed, with penalties and

interest thereon, if any, shall be first deposited with the tax commission and there shall be filed with the tax commission an undertaking, issued by a surety company authorized to transact business in this state and approved by the superintendent of insurance of this state as to solvency and responsibility, in such amount as a justice of the supreme court shall approve to the effect that if such proceeding be dismissed or the tax confirmed the petitioner will pay all costs and charges which may accrue in the prosecution of the proceeding, or at the option of the applicant such undertaking filed with the tax commission may be in a sum sufficient to cover the taxes, penalties and interest thereof stated in such determination plus the costs and charges which may accrue against it in the prosecution of the proceeding, in which event the applicant shall not be required to deposit such taxes, penalties and interest as a condition precedent to the application."

New York Tax Law, § 1147 provides in pertinent part:

"§ 1147. Notices and limitations of time

"(a)(1) Any notice authorized or required under the provisions of this article may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this article or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable. A notice of determination shall be mailed promptly by registered or certified mail. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to

whom addressed. Any period of time which is determined according to the provisions of this article by the giving of notice shall commence to run from the date of mailing of such notice."

New York Civil Practice Law and Rules, § 217 provides in pertinent part:

> "217. Proceeding against body or officer; four months
>
> "Unless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner or the person whom he represents in law or in fact, or after the respondent's refusal, upon the demand of the petitioner or the person whom he represents, to perform its duty * * *."

Summary of Argument.

The order of the New York Court of Appeals which is appealed in this case was entered on September 15, 1983. The notice of appeal was not filed until December 23, 1983, which is beyond the 90-day time limitation for appeals to this Court.

The New York procedural requirement for payment of sales taxes, penalties, interest and court costs for filing an undertaking for payment of them as a condition precedent to commencing a proceeding for judicial review of an administrative determination after an evidentiary hearing does not deprive appellants of due process of law. This Court in *Flora v. United States*, 357 US 63 (1958), on

reargument 362 US 145 (1960), and *Dodge v. Osborn*, 240 US 118 (1915), has upheld similar condition precedents for review of Federal tax deficiencies. In the light of these prior holdings, the appellants have failed to raise a substantial Federal question.

Additionally, the appellants failed to commence a timely proceeding in the New York Supreme Court for review of the administrative determination sustaining their tax liability. Their untimely proceeding in the New York Supreme Court has mooted the questions which they seek to present to this Court.

ARGUMENT.

POINT I.

The appeal should be dismissed because the notice of appeal and the jurisdictional statement were not timely filed.

In their notice of appeal, the appellants state that they are appealing from the judgment entered in the Supreme Court, County of Albany, State of New York on the 29th day of September, 1983, "pursuant to an order of the New York Court of Appeals dismissing the petitioners appeal to that court". 28 United States Code § 1257 (Judiciary and Judicial Procedure) provides that appeals are to be taken from the State's highest court from which the decision was rendered. The highest court in this case was the New York Court of Appeals and its decision and remittitur both were dated September 15, 1983. It was necessary that appellant file both the notice of appeal and the jurisdictional statement within 90 days of that date (28 USC 2101). The copy of the notice of appeal in this

jurisdictional statement is undated. However, the notice of appeal filed in the Albany County Clerk's Office on December 23, 1983 is dated December 22, 1983 which was more than 90 days after the Court of Appeals decision and remittitur. (See Addendum to this brief.) The jurisdictional statement was filed on December 28, 1983, even later.

Appellants appear to take the position that their appeal is from the judgment of the Supreme Court which was entered on September 29, 1983. The appeal is not taken from the judgment of the Supreme Court but from the highest court of the State which rendered its decision in the matter and in this case that was the New York Court of Appeals. This question was considered in *Department of Banking of Nebraska v. Pink*, 317 US 264 (1942), reh den 318 US 802 (1942). In that case this Court considered the question of when the time to appeal to the Supreme Court of the United States starts running from an order of a state appellate court where it directs a lower state court to enter a judgment based on its decision. This Court said (pp 267-268):

> "Certain questions with respect to the timeliness of applications for review of state court judgments, which are now pending before us in petitions for rehearing in two cases, have recurred so frequently that we think it appropriate to add a word for the guidance of the Bar. It is true that our writ to review a judgment of the highest court of a state may properly run to a lower court where the record is physically lodged, and where under New York practice a judgment is entered upon the remittitur of the Court of Appeals. It is nevertheless immaterial whether the record is physically lodged in

the one court or the other, since we have ample power to obtain it from either. *Alterton v. Fowler*, 91 U. S. 143, 146. In reliance upon the early decision in *Green v. Van Buskerk*, 3 Wall. 448, the period for appeal or application for certiorari has on occasion been computed not from the judgment or order of the New York Court of Appeals, but from the judgment subsequently entered by the lower court upon the Court of Appeals' remittitur. This practice, which is a departure from the rule applied to cases from other states, is inconsistent with our many decisions on the nature of a final judgment under Sec. 237 of the Judicial Code, 28 U.S.C. Sec. 344, and cannot be sanctioned. See especially Chief Justice Waite's opinion in *Mower v. Fletcher*, 114 U.S. 127, where a state appellate court's judgment was held to be final and reviewable when it ended the litigation by fully determining the rights of the parties, so that nothing remained to be done by the lower court except the ministerial act of entering the judgment which the appellate court had directed. See also *Wurts v. Hoagland*, 105 U.S. 701, 702, and *Clark v. Williard*, 292 U.S. 112, 117-118. This rule applies with equal force to cases from New York in which the judgment or order of the Court of Appeals is reviewable here as a final judgment when the record reveals that it leaves nothing to be done by the lower court except the ministerial act of entering judgment on the remittitur. Such an order is, within the meaning of Sec. 237 of the Judicial Code, a final judgment reviewable here.

* * *

> "Where the order or judgment is final in this sense, the time for applying to this Court runs from the date of the appellate court's order, since the object of the statute is to limit the applicant's time to three months from the date when the finality of the judgment for purposes of review is established."

Since the decision of the Court of Appeals in the instant case determined the matter and the Supreme Court entering a judgment on the remittitur was merely a ministerial act required by it under the mandate of the Court of Appeals, claimant's time to appeal ended 90 days after September 15, 1983, the date of the Court of Appeals judgment, and therefore the filing of the notice of appeal and the jurisdictional statement were not timely.

POINT II.

The appellants did not raise a substantial Federal question in the Court below.

Under the provisions of New York Tax Law, § 1138, persons against whom a determination of liability for sales and use taxes have been issued may apply for an administrative evidentiary hearing by filing a petition with the New York State Tax Commission for a redetermination of that liability. At the conclusion of that hearing, the Tax Commission issues a final determination which can be reviewed by the New York courts for error, illegality or unconstitutionality or any other reason by bringing a proceeding in the nature of certiorari. Where the constitutionality of a statute is raised, the proceedings are converted into actions for declaratory judgments. The period of limitations remains the same. See *Solnick v. Whalen*, 49 NY2d 224 (1980), 425 NYS2d 68, 401 NE2d 190; *Press v.*

County of Monroe, 50 NY2d 695 (1980), 431 NYS2d 394, 409 NE2d 870. The proceeding must be commenced within four months after the giving of notice of the Tax Commission's determination. The four-month time limitation commences on the day that notice is sent by registered or certified mail to the applicant.

The statute provides for a condition precedent to the commencement of a proceeding for judicial review of such determinations.

A person seeking judicial review of such determinations must first deposit with the Tax Commission the amount of the tax sought to be reviewed with the penalties and interest thereon, if any, and file with the Tax Commission an undertaking issued by a surety company, in such amount as a Justice of the Supreme Court of New York shall approve to the effect that if such proceeding be dismissed or confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of the proceeding. Such costs and charges rarely exceed $250. The applicant has the option instead of depositing the tax, penalty and interest, of filing an undertaking sufficient to cover the taxes, penalty and interest plus the costs and charges which may accrue in the proceeding.

The principle that a taxpayer seeking judicial review of a determination by the taxing authorities must pay first and litigate later has long been upheld by this Court. *Flora v. United States*, 357 US 63 (1958), on reargument 362 US 145 (1960); *Dodge v. Osborn*, 240 US 118 (1915). In *Flora*, it was recognized that there would be hardship cases but recognized that any amelioration is a matter for the Legislature and not for the courts. Here, the appellants were given free access to an evidentiary hearing before the

Tax Commission of which they availed themselves. That hearing was analogous to hearings before the United States Tax Court.

Even, assuming *arguendo* that the condition precedent for bringing a proceeding for judicial review deprives the appellants of property without due process of law, the appellants did not seek timely review. New York Civil Practice Law and Rules, § 217 and sections 1138(a) (4) and 1147(a) of the New York Tax Law provide that a proceeding brought against the State Tax Commission must be commenced within four months after the determination sought to be reviewed becomes final and binding on a taxpayer. In the present case, the determination of the Tax Commission sustaining sales and use taxes due from the appellants became final and binding on October 23, 1981 pursuant to sections 1138(a) (4) and 1147(a) of the Tax Law when the decision was sent to the petitioners by certified mail on that date. The four-month period when a CPLR Article 78 or declaratory judgment action proceeding could be brought for judicial review expired on February 23, 1982. The review proceeding was not initiated until Friday, February 26, 1982, which was three days late. As a result, it is submitted that the issues raised by the appellants are moot and even if this Court sustained their contentions that the procedural history of this case demonstrates that the determination of the State Tax Commission deprives the appellants of property without due process of law, they are not able to obtain the ultimate relief which they seek.*

*While courts below did not reach this issue as unnecessary (94 AD2d 885, 886), the New York cases make it clear that the determination was final even though the amount of tax due with interest is subsequently recomputed. *Mtr. of Corbisiero v. State Tax Commission*, 82 AD2d 990, 991 (3d Dept, 1981), 440 NYS2d 396, affd 56 NY2d 680 (1982), 451 NYS2d 716, 436 NE2d 1318.

CONCLUSION.

The appeal should be dismissed because of failure of the appellants to timely file their notice of appeal and raise a substantial Federal question.

Dated: Albany, New York
January 10, 1984

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Appellees

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Acting Attorney in Chief
Appeals and Opinions

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Assistant Attorney General
of Counsel

ADDENDUM.

Decision of the New York State Court of Appeals.

In the Matter of TOP TILE BUILDING SUPPLY CORP. *et al.*, Appellants, v. NEW YORK STATE TAX COMMISSION *et al*, Respondents.

Submitted July 11, 1983; decided September 15, 1983

Reported below, 94 AD2d 885.

Motion to dismiss appeal granted and appeal dismissed, with costs and $20 costs of motion, upon the ground that the appellants are not aggrieved by the modification at the Appellate Division (CPLR 5601, subd [a], par [iii]), and that no substantial constitutional question is directly involved.

Notice of Appeal, Dated December 22, 1983.

STATE OF NEW YORK,

SUPREME COURT—COUNTY OF ALBANY.

IN THE MATTER

OF

TOP TILE BUILDING SUPPLY CORP., TOP CARPET CORP., NORMAN L. STONE, RICHARD STONE,

Petitioners-Appellants,

against

NEW YORK STATE TAX COMMISSION; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; JAMES H. TULLY, Jr., MILTON KOERNER, THOMAS H. LYNCH, Individually and as Commissioners of the State Tax Commission,

Respondents-Respondents.

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

Index No. 3381-82

Sirs:

PLEASE TAKE NOTICE that the above named petitioners, Top Tile Building Supply Corp., Top Carpet Corp., Norman L. Stone and Richard Stone hereby appeal to the Supreme Court of the United States from the judgment in the above-captioned matter entered in the Supreme Court, County of Albany, State of New York on the 29th day of September, 1983, pursuant to an order of the New York Court of Appeals dismissing the petitioners appeal to that court, and from each and every part of the aforesaid judgment. Said appeal is taken pursuant to Title 28 United States Code. Section 1257(2).

Dated: White Plains, N.Y.
December 22, 1983

Yours, etc.

LORENTZ W. HANSEN

cc. Attorney General, State of New York
c/o Francis V. Dow
Assistant Attorney General
Department of Law
Albany, N.Y. 12224

New York State Tax Commission,
New York State Department of
Taxation and Finance,
James H. Tully, Jr., Milton
Koerner, Thomas H. Lynch,
members.
c/o Francis V. Dow
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Clerk, Appellate Division, Third Department
Box 7288, Capitol Station
Albany, N.Y. 12224

Certificate of Service.

Lorentz W. Hansen hereby certifies as follows:

1. I am a member of the bar of New York State, and counsel for petitioners herein.

2. On December 22, 1983 I served copies of the attached notice of appeal on the following persons at the following addresses, by placing the copies in post paid properly addressed wrappers:

1. Attorney General, New York
c/o Francis V. Dow
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Albany, N. Y. 12224

2. Francis V. Dow
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3. Clerk
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4. Clerk
   Supreme Court, Albany County
   Eagle & Columbia Streets
   Albany, N. Y. 12207

5. New York State Tax
   Commission, New York
   State Department of
   Taxation and Finance
   James H. Tully, Jr.
   Milton Koener, Thomas
   H. Lynch, members
   c/o Francis V. Dow
   Assistant Attorney General
   Department of Law
   Albany, N. Y. 12224

LORENTZ W. HANSEN
175 Main Street
White Plains, N. Y.
914-948-3908

State of New York
County of Albany Clerk's Office ss.:

I, GUY D. PAQUIN, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, DO HEREBY CERTIFY that I have compared the annexed copy notice of appeal with the original thereof filed in this office on the Dec day of 23 1983 and that the same is a correct transcript therefrom, and of the whole of said original.

IN TESTIMONY WHEREOF, I have hereunto set my name and affixed my official seal, this Dec day of 30th 1983

GUY D. PAQUIN, Clerk

(Seal)